FILE COPY

Office - Supr
FI
MAY 1
CHARLES EL

Supreme Court of the United States

OCTOBER TERM—1935.

No. [redacted] 31

JOSE RIVERA SOLER & CO., INC.,
Petitioner,

against

UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HENRI BROWN,
San Juan, P. R.

CARROLL G. WALTER,
120 Broadway,
New York, N. Y.,
Counsel for Respondent.

INDEX

	PAGE
OPINION BELOW	1
STATEMENT OF THE CASE	1
NATURE OF DECISION BELOW	3

ARGUMENT

I. The decision of the Circuit Court of Appeals is not in conflict with any decision of this court or of any Circuit Court of Appeals.
On the contrary, it is in strict accord with authority 5

II. The result reached below is correct for the additional reason that petitioner's failure to comply with the Iron Safe Clause entitled respondent to the direction of a verdict in its favor 12

TABLE OF CASES

American Central Ins. Co. *v.* Harmon Knitting Mills, 39 Fed. 2d 21 6
Atlas Ins. Co. *v.* Hurst, 11 Fed. 2d 250 6

Camden Fire Ins. Ass'n *v.* Penick, 2 Fed. 2d 964 6
Connecticut Fire Ins. Co. *v.* Hurst, 11 Fed. 2d 254 6
Cragin *v.* Lovell, 109 U. S. 195 12

Domagalski *v.* Springfield Fire & Marine Ins. Co., 218 N. Y. App. Div. 187 9
Dorroh-Kelly Co. *v.* Orient Ins. Co., 104 Texas 199, 135 S. W. 1165 14

Globe & Rutgers Fire Ins. Co. *v.* Stallard, 38 Fed. 2d 237 6
Great American Ins. Co. *v.* Roney & Berger Co., 42 Fed. 2d 816 6
Gunther *v.* Liverpool Ins. Co., 134 U. S. 110, 116 5

Hamilton Shoe Co. *v.* Wolf Bros., 240 U. S. 251 4
Hanover Fire Ins. Co. *v.* Moore, Texas , 280 S. W. 538 14
Hermanos *v.* Royal Exchange Ins. Co., 277 U. S. 590 5
Hiller Co. *v.* Insurance Co. of N. A., 125 La. 938, 52 So. 104 10
Home Ins. Co. *v.* Williams, 237 Fed. 171 ..... 15, 16
Houff *v.* German Ins. Co., 110 Va. 585, 66 S. E. 831 16

Imperial Fire Ins. Co. *v.* Coos County, 151 U. S. 452 14
Insurance Companies *v.* Weides, 14 Wall. 375 5

Langnes *v.* Green, 282 U. S. 531 13
Levy *v.* Baillie, 7 Bing. 349 10

Mack *v.* Lancashire Ins. Co., 4 Fed. 59 5
McLeod *v.* Citizens Ins. Co., 13 Nova Scotia 21 10

National Fire Ins. Co. *v.* Renier, 22 Fed. 2d 671 6

Pangburn *v.* Buick Motor Co., 211 N. Y. 228 11

PAGE

Riley v. Ætna Ins. Co., 80 W. Va. 236, 92 S. E. 417, L. R. A. 1917 E. 983.. 10

Scottish Union Ins. Co. v. Virginia Shirt Co., 113 Va. 353, 74 S. E. 228.... 16
Slacum v. Pomery, 6 Cranch. 221 12
Small, A. B. Co. v. Lamborn & Co., 267 U. S. 248 5
Spring Garden Ins. Co. v. Amusement Syndicate Co., 178 Fed. 519 6
Sternfeld v. Park Fire Ins. Co., 50 Hun 262 7

United States v. American Ry. Exp. Co., 265 U. S. 425 13

Western Assurance Co. v. Kemendo, 94 Texas 367, 60 S. W. 661 13
Wright v. Union Ins. Co., 13 Fed. 2d 612 16

Supreme Court of the United States

OCTOBER TERM—1935.

No. 928.

JOSE RIVERA SOLER & CO., INC.,

Petitioner,

against

UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA,

Respondent.

BRIEF FOR RESPONDENT.

In Opposition to Petition for Writ of Certiorari.

Opinion Below.

The opinion of the Circuit Court of Appeals is now reported in 81 Fed. 2d 385.

Statement of the Case.

No Federal question, and no question of general importance, is presented.

Petitioner sued upon a policy of fire insurance issued by respondent in the sum of $15,000 on merchandise, cost of labor, and materials, $12,000 on machinery, and $3,000 on furniture and fixtures, claiming a total loss and asking judgment for the total amount insured of $30,000 (R. 1-5).

Respondent defended upon the ground of failure to comply with the Iron Safe Clause (R. 9, 10) and upon the ground that the policy had been forfeited by the making of false declarations and fraudulent claims thereunder (R. 7, 8).

The policy required the submission of a proof of loss (R. 250), and in the sworn proof of loss submitted pursuant to that requirement petitioner fixed the "cash value" of the destroyed property "at the time of the fire" at $35,926 (R. 254-263).* That statement as to the nature and value of the property insured and destroyed was repeated in the complaint (R. 3, 4), which likewise was sworn to (R. 5).

At the close of all the evidence, respondent moved for a directed verdict (R. 13, 14, 15), but the motion was denied and the case submitted to the jury (R. 13). Respondent excepted to the denial (R. 13).

The jury returned a verdict for the plaintiff for $17,000 (R. 13, 24). The District Court "ordered that judgment in accordance with the verdict of the jury be entered" (R. 25).

Respondent appealed (R. 25, 26), and assigned as error (a) the refusal to direct a verdict in its favor, (b) two errors in instructions to the jury, and (c) that the verdict and judgment are contrary to law (R. 26-28).

The Circuit Court of Appeals at first declined to consider the last mentioned assignment on the ground that no motion, ruling or exception relating to the matter was had or taken in the District Court (R. 323, 344), but it afterwards granted a rehearing—the petition for which appears at R. 329-342—and sustained that assignment and vacated

---

* That was made up as follows:

First item (Merchandise, cost of labor and materials)	$17,345.21 (R. 255)
Second item (Machinery)	14,835.10 (R. 256, 257)
Third item (Furniture and fixtures)	3,745.75 (R. 257, 258)
	$35,926.06

the judgment of the District Court and directed that court to enter an order in arrest of judgment (R. 343, 352).

Nature of Decision Below.

1. Petitioner's assertion that under the decision below "any discrepancy whatever, regardless of amount and of fraud" would justify an arrest of judgment (Pet., p. 25) is wholly without foundation. The decision rests upon the existence of a discrepancy so great as to show fraud (R. 347; 81 Fed. 2d at p. 387). Stated in terms of dollars, the verdict is $13,000 less than it would have been if the property had been worth the amount sworn to, or even within $5,926.06 of the amount sworn to—that is, if the jury had believed that the property was worth either $35,926.06 or any other amount down to $30,000, then the verdict would have been for $30,000, whereas it was for only $17,000. Stated in terms of percentage, the verdict is for but little over 50% of what it would have been if the jury had believed that the property was worth the amount sworn to or any other amount within $5,926.06 of the amount sworn to. Stated in still another form, the jury found that property of an ordinary and staple sort, having no unique characteristics or unusual elements of value, was worth $18,000 less than had been stated in the sworn proof of loss, or just about one-half the amount so sworn to.

The court below obviously did not mean, and nothing in its opinion suggests that it means, that "any discrepancy" would be equivalent to a finding of fraud. All that the decision means is that in this particular case the court regarded the discrepancy as so great as to show fraud.

A ruling of that sort does not justify the extraordinary writ of certiorari pursuant to a jurisdiction which this court

has declared is to be "exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision" (*Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 258).

Furthermore, the decision accords with authority (see pp. 5-12, *infra*).

2. Petitioner's further assertion that the decision below rests upon "an incomprehensible oversight by the majority of the court as to the facts in the record" (Pet., p. 2) is likewise unfounded. It is in the opinions of Judge MORTON, not in the final opinion of the court, that the error as to the facts occurs—and his error arises from his failure to distinguish between *goods in process* and *cost of labor on goods in process* (R. 326, 349-350).

It is true that, as Judge MORTON points out at R. 350, the expert accountant, Gorbea, testified that "According to what the books show the plaintiff has * * * goods in process $2524 * * *" (R. 37). But what Judge MORTON overlooked is that the proof of loss contains a claim for "*labor on* goods in process $2524.50" *in addition to* claims for both raw materials and manufactured and unmanufactured goods (R. 255). "Goods in process" and "labor on goods in process" obviously are two entirely different things, and the majority opinion is literally and wholly correct in its statement, at R. 347, that the only evidence in the record as to what the $2524 represents is Rivera Soler's own statement that the item was not for cost of labor but the contract price for finished goods (See R. 111, 112, 118).

Judge MORTON erred, also, in his statement that there is no evidence that Soler was making any profit on this work or did not take it at cost (R. 351), for Rivera Soler specifically stated that he included "the cost of labor, the overhead expenses *and my profit*" (R. 118).

ARGUMENT.

I.

The decision of the Circuit Court of Appeals is not in conflict with any decision of this court or of any other Circuit Court of Appeals.

On the contrary, it is in strict accord with authority.

An examination of the cases cited by petitioner will instantly reveal that none of them presented the situation presented in the case at bar and that the asserted conflict does not exist.

Insurance Companies v. *Weides*, 14 Wall. 375, which is particularly relied upon, holds nothing more than that whether or not there has been such fraud or false swearing as voids a policy is a question of fact which *ordinarily* must be submitted to the jury.* In the case at bar that question *was* submitted to the jury, and what the Circuit Court of Appeals has held is, not that it was error to submit it, but that where the jury finds for an amount grossly disproportionate to the amount sworn to its verdict necessarily imports a finding of fraudulent overvaluation and consequently in legal effect is a verdict for the defendant and does not justify the entry of judgment thereon in favor of the plaintiff.

In *Mack* v. *Lancashire Ins. Co.*, 4 Fed. 59, upon which petitioner also lays considerable stress, the question was submitted to the jury, but the report does not show what the jury found or what judgment was entered upon its verdict.

---

* Other cases in this court recognize that it sometimes is proper to direct a verdict for the insurer even upon that question: *Hermanos* v. *Royal Exchange Assurance Co.*, 277 U. S. 590, denying petition for certiorari to review 23 Fed. 2d 270; *Gunther* v. *Liverpool Ins. Co.*, 134 U. S. 110, 116; *A. D. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254.

Spring Garden Ins. Co. v. *Amusement Syndicate Co.*, 178 Fed. 519, was tried before a *master*, who specifically found that the proof of loss was made in good faith and not with any view to deceive (p. 531).

In *Great American Ins. Co.* v. *Roney & Berger Co.*, 42 Fed. 2d 816, the jury's verdict was for *the total amount of the policy sued on* and thus indicated, as pointed out by the court, "a loss of true values equal to or more than the amount of the verdict" (p. 818).

In *Camden Fire Ins. Ass'n.* v. *Penick*, 2 Fed. 2d 964, the verdict and judgment were based on the loss of 788 bales of cotton, which was *the identical amount claimed in the amended complaint.*

Atlas Ins. Co. v. *Hurst*, 11 Fed. 2d 250 must be read in connection with *Connecticut Fire Ins. Co.* v. *Hurst*, 11 Fed. 2d 254, because they were companion cases arising out of the same fire, and the total of all the judgments was $24,182.52 on policies aggregating $27,000.

In *National Fire Ins. Co.* v. *Renier*, 22 Fed. 2d 671, the report does not disclose either the amount claimed or the amount awarded.

In *Globe & Rutgers Fire Ins. Co.* v. *Stallard*, 68 Fed. 2d 237, a judgment in favor of the insured was reversed because of errors in the charge, and all that actually was held was that in the face of conflicting evidence as to the value it was proper to submit the case to the jury.

American Central Ins. Co. v. *Harmon Knitting Mills*, 39 Fed. 2d 21, was an *equity case* in which there was a specific finding of absence of intent to defraud.

Instead of being contrary to authority, the decision below is supported by well-reasoned decisions by courts of high repute.

In *Sternfeld* v. *Park Fire Ins. Co.*, 50 Hun 262 (N. Y. Sup. Ct., General Term, First Dept.), the jury found for the plaintiff for one-half the amount of the defendant's policy, and the judgment was reversed on the ground that the plaintiff's overstatement of his claim constituted a fraud which voided the policy. The court there said (pp. 264-266):

> "To render this verdict the jury must have reached the conclusion, as the whole insurance did not exceed the sum of $10,000, and it was to be divided and equally proportioned between the companies whose policies were issued upon the property, that the whole loss of De Vulder by the fire amounted to no more than the sum of $5,000. This left an over-statement in his proofs of loss of $18,342.47. *To that extent the jury must necessarily have assumed that the proofs of loss were untruthful.* Neither the evidence of De Vulder, nor that of any other witness, tended to explain this difference on the ground of any mistake or misapprehension concerning either of the facts upon which the proofs were made and verified; and, as there was no ground from which it could be inferred that the loss had been overstated in this manner by mistake, there was reason for assuming that it had been fraudulently made to defraud the insurance company out of the other half of the amount of the policy. *Such an inference necessarily follows from so great a difference.* The loss in this manner had been stated by the assured to an amount exceeding three-fifths of what had actually been sustained; and it is not to be supposed or presumed that it could have been so over-stated by any mistake intervening in the statements presented by the proofs. But the inference is direct and plainly to be drawn from this difference, that De Vulder must have known that this statement was untruthful, and his affidavit verifying it was false, and from that the conclusion follows, that it was intended thereby to defraud the insurance company; and this inference is materially strength-

ened by the fact that the preceding inventory of De Vulder's stock, taken in January, 1884, amounted to no more than the sum of $20,478.13, and his business afterwards was not prosperous, and the fire, causing the loss, was of very short duration and confined only to a portion of the store.

"In *Boynton* v. *Andrews* (63 N. Y. 93), property had been taken by a manufacturing corporation for which it had issued its stock. The property was proven to have been worth no more than fifty per cent. of the amount for which it was received by the company and its stock was issued. *And from this difference the court held that the law would assume the transaction to be fraudulent, leaving no question of fact as to the intent to be passed upon by a jury.* Applying the principle of that decision to this case and the inference is much more strongly sustained that there was an intent to deceive and defraud the company by this over-statement of the loss of the assured. *And that the over-statement existed is clear from the verdict of the jury, which proceeded upon the conclusion that the actual loss did not exceed the sum of $5,000. This could have been adopted on no other view of the evidence than that the assured had over-stated his loss to the extent of upwards of $18,000.* And upon that fact necessarily entering into the case, from the verdict which the jury have rendered, *they should, instead of finding for the plaintiff any sum of money, have found in favor of the defendant,* for the policy had provided that, 'any fraud or attempt at fraud, or any misrepresentation in any statement touching the loss, or any false swearing on the part of the assured or his agent, in any examination or in the proof of loss or otherwise, shall cause a forfeiture of all claim on this company under this policy, and in such case this company shall have the right at any time to require the same to be delivered up to be canceled.' *Under this provision this fraudulent over-statement of the loss forfeited all claim to indemnity*

upon the policy and entitled the company to a verdict against the plaintiff."

In *Domagalski* v. *Springfield Fire & Marine Ins. Co.*, 218 N. Y. App. Div. 187, the plaintiff claimed $22,761.10 in his proof of loss and in his testimony at the trial, and the jury found in his favor for $5,000, and the judgment entered upon that verdict was reversed with an opinion by Presiding Justice HUBBS, now Judge HUBBS of the New York Court of Appeals, which was concurred in by Mr. Justice CROUCH, who, also, is now a Judge of the New York Court of Appeals. In that opinion it is said (pp. 189, 190):

"This clause of the policy makes clear that the general rule of insurance law requiring good faith and fair dealing applies to fraudulent statements and false swearing made by an assured after a loss. Courts have been assiduous to prevent the use of the clause to bar a recovery where the alleged fraud or false swearing was not intentional, or the false statements were matters of opinion honestly, although mistakenly, held by the assured. On the other hand, they have not hesitated to hold that a recovery would not be permitted if it clearly appeared that the assured had intentionally made false and fraudulent statements or intentionally sworn falsely. Under such circumstances it has been held that the assured was barred from recovering by the terms of the policy.

Juries are prone to disregard a defense based on the clause in question and no doubt justify such action on the ground that the insurance company will not be injured if the verdict does not exceed the amount of the actual damage suffered. There is no justification in law for such conduct. When the insurance company establishes that the statements made were relevant, material and intentionally false it has established its defense. It is not required to assume the burden of

> convincing a jury that it has been injured by such statements. If it appears that a plaintiff has willfully and fraudulently placed in the proofs of loss a statement of property lost which he did not possess, or has placed a false and fraudulent value upon the articles which he did own, he is not entitled to recover anything."

In like manner, in *Riley* v. *Aetna Ins. Co.*, 80 W. Va. 236, 92 S. E. 417, L. R. A. 1917 E. 983 and *Hiller Co.* v. *Insurance Co. of N. A.*, 125 La. 938, 52 So. 104, the jury found for the insured for about half the amount claimed, and in each case it was held that the judgment entered upon the verdict should be reversed because of fraudulent overvaluation.

In *Levy* v. *Baillie*, 7 Bing. 349 (1831) the plaintiff made affidavit that his loss was £1085 and the jury found in his favor for £500; and defendant's rule for a new trial on the ground that such verdict "amounted in effect to a verdict for the defendants under the condition which avoided the policy if there were any fraud or false swearing in the plaintiff's claim" was *made absolute.*

In *McLeod* v. *Citizens' Ins. Co.*, 13 Nova Scotia 21, it was said (pp. 27, 28):

> "The second jury found a verdict for $2000, of which we must assume one-half to go for the machinery, leaving $1000 for the mill, that is, one-third of what the plaintiffs swore it was worth, and one-half of what they insured on it. This of itself is an index of fraud under the decision in Levy *v.* Baillie, 7 Bing., 349."

and judgment was there ordered for the defendant despite the jury's verdict for the plaintiff.

Each of the six cases last cited proceeds upon identically the same principle which was applied by the Circuit Court of Appeals in the case at bar, *viz.*, that the verdict itself imports a finding that there was a fraudulent overvaluation of the plaintiff's claim and thus itself establishes that the defendant, not the plaintiff, is entitled to judgment.

The same principle was applied in *Pangburn* v. *Buick Motor Co.*, 211 N. Y. 228, in which the jury in a personal injury case found in *favor* of the employee-driver and *against* the employer-owner. The New York Court of Appeals there reversed the judgment entered upon such verdict against the employer-owner, and in so doing said (pp. 233-234):

> "*We think the verdict as a whole was equivalent to one finding no cause of action against the appellant.* As has already been pointed out, the only claim of liability against it was based on the alleged negligence of its employee. The primary and absolutely essential facts to be found by the jury before any liability could be visited upon the appellant were that the driver of the machine was negligent and that the plaintiff was free from negligence. * * * The appellant's liability was purely of a derivative or secondary character on the theory of *respondeat superior,* and when the jury found that the employee was free from tortious conduct or that the plaintiff was guilty of contributory negligence, *the facts were settled which necessarily led to a verdict of immunity so far as appellant was concerned,* and the verdict should have been in its favor. *There was then left no support for or consistency in a verdict against the employer.*
>
> "When the jury took its improper and unwarranted course, nevertheless, of rendering a verdict against it, a situation was presented somewhat analogous to the one which arises where inconsistent findings have been made or where a jury has found a general verdict which is inconsistent with special findings, and in determining whether the judgment is supported and authorized we think that the appellant is entitled to have applied the principles which give to an appellant the benefit of the most advantageous of the inconsistent findings (*Whalen* v. *Stuart,* 194 N. Y. 495), or which make the special findings superior in effect to the general verdict (Code, § 1188), *and thus to have the award of damages*

against it controlled by and yield to the verdict and findings that the facts did not exist which justified such an award of damages."

It was very clearly and accurately pointed out in the *Domagalski* case, *supra,* that juries are prone to disregard a defense based on fraudulent overvaluation because of a feeling on their part that the insurance company will not be injured if the verdict does not exceed the amount of the actual damage suffered. It is quite apparent that that is what happened in the case at bar. But, as was also pointed out in that case, there is no justification in law for that course.

The facts which entitle the insurance company to judgment, viz., the fraudulent overvaluation of the claim, having been established by the verdict, the situation obviously was not one in which respondent should be forced to move for or to submit to a new trial (see authorities cited in Petition for Rehearing at R. 336, 337). On the contrary, it became the duty of the court to award the relief which the law requires upon those facts, *i. e.,* to direct that judgment upon the verdict be arrested (*Slacum* v. *Pomery,* 6 Cranch 221, 225; *Cragin* v. *Lovell,* 109 U. S. 194, 199, 200.)

II.

The result reached below is correct for the additional reason that petitioner's failure to comply with the Iron Safe Clause entitled respondent to the direction of a verdict in its favor.

Although the Circuit Court of Appeals did not place its decision upon the ground that the District Court erred in not directing a verdict for respondent, it actually granted

a rehearing as to that point (R. 343); and as the result reached by the Circuit Court of Appeals is the same as if that point had been sustained, it is here open to respondent to urge that point in support of the decision below.

Langnes v. *Green,* 282 U. S. 531, 538;
United States v. *American Railway Express Co.,* 265 U. S. 425, 435.

We conceive, too, that certiorari will not be granted if this court be convinced that the result reached below is correct upon any ground.

We hence discuss the question whether or not a verdict should have been directed.

The Iron Safe Clause requires "a complete itemized inventory of stock on hand" (R. 246). The inventory produced by petitioner concededly, and as appears from a bare inspection of it, purports to be, at most, an inventory of only the goods owned by the plaintiff (R. 296-299), whereas the policy covered, not only goods owned by the plaintiff, but, also, goods "held in trust or on commission, or consignment, or on joint account with others, or held on storage for which the assured may be legally liable, or sold but not delivered" (R. 244).

The uncontroverted evidence thus establishes that petitioner did not have "a complete itemized inventory of stock on hand" as required by the policy, for upon no conceivable theory can it be held that an inventory which concededly enumerates only a part of the merchandise insured constitutes a compliance with the policy.

A partial inventory is not a complete inventory. The clause in question requires "an itemized inventory of *the stock insured*" (*Western Assurance Co.* v. *Kemendo,* 94

Texas 367, 371, 372; 60 S. W. 661), and when the inventory is not complete it is error to refuse a peremptory instruction for the defendant (*Dorroh-Kelly Co.* v. *Orient Ins. Co.*, 104 Texas 199, 202, 135 S. W. 1165; *Hanover Fire Ins. Co.* v. *Moore*, Texas , 280 S. W. 538, 540).

An inventory which does not show merchandise held for others as well as merchandise owned, where both are covered by the policy, fails to give that information as to the nature and extent of the insured stock which insurance companies all over the country for many years have found it necessary to contract for. Such failure puts the insurance company at a disadvantage in checking other information which is given. In some cases information as to property held for others would have a material bearing where other insurance is permitted or where the policy-holder is a co-insurer. In other cases it would have a material bearing as to the presence of prohibited articles, like gasoline or explosives. It is not necessary, however, for the insurance company affirmatively to show that failure to inventory the merchandise held for others actually caused it loss or damage. It is enough for the insurance company to show that the clause was not complied with (*Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S. 452, 462, 464, 466).

In fact, however, an inventory of the goods held for others was of the utmost importance in the case at bar because the principal business of the insured was manufacturing goods for others (R. 56, 57). The business of manufacturing for its own account started only shortly before the fire (R. 113, 135). The greater part of the merchandise at risk thus always was goods held for others.

The Iron Safe Clause also requires the insured to "keep *a set of books*, which shall clearly and plainly present *a complete record of business transacted*, including all purchases,

sales and shipments, both for cash and credit, from date of inventory as provided for in the first section of this clause, and during the continuance of this policy" (R. 246).

Petitioner's own bookkeeper testified "We did not carry a stock book" (R. 66). He also testified "the plaintiff corporation did not have a cash book" (R. 84).

He claimed that there was "no necessity" for a stock book because "We could determine how many yards were left of any one material at the end of any one month by making an inventory" (R. 66). But inventories were not made every month, and he expressly admitted that "there is *no way of determining from the books* how many yards of material, cloth, was used in any one month, or how many yards of thread" (R. 66, 67).

As an attempted substitute for a cash book, petitioner presented a copy of its account with its bank showing the checks issued and deposits made (R. 81). But its bookkeeper admitted that "there is no way of determining who those checks were issued to" (R. 81) and that the bank's statement "only shows the amount for which it (the check) was issued and the amounts of the deposits" (R. 81, 82). There was thus no record showing what goods had been sold.

Petitioner's own evidence thus definitely established a failure to comply with the provision of the Iron Safe Clause with respect to the keeping of books; for while that clause does not require any particular method of bookkeeping, it is well settled that the books themselves must be sufficient without the aid of oral testimony (*Home Insurance Co.* v. *Williams*, 237 Fed. 171, 176, 177).

It being thus established by petitioner's own evidence that the inventory covered only a part of the merchandise insured and that petitioner kept no cash book and no stock

book, the question whether or not there was a compliance with the Iron Safe Clause was a question of law for the Court, and it was error to leave it to the jury to say whether or not the inventory and books produced constituted a compliance (*Home Insurance Co.* v. *Williams,* 237 Fed. 171; *Houff* v. *German Ins. Co.,* 110 Va. 585, 591, 592, 66 S. E. 831; *Wright* v. *Union Ins. Co.,* 13 Fed. (2d) 612, 613, 614; *Scottish Union Ins. Co.* v. *Virginia Shirt Co.,* 113 Va. 353, 361, 362, 74 S. E. 228).

In the first opinion of Judge MORTON it is stated that the plaintiff offered the evidence of several witnesses, including an expert accountant, to the effect that its books and accounts were of such character as to afford "a reasonably complete picture" of its business activities, and that they were honestly made and kept as required by the policy (R. 325). But while it is true that the plaintiff's expert accountant made a statement very close to that indicated in the opinion (R. 42), the fact remains that that is merely the expression of an opinion by a paid expert and not the statement of a fact. His testimony as a whole makes it perfectly apparent that all he meant was that he could construct *a* statement or report of what the books showed, for he concededly had no personal knowledge of the business and hence could not know whether or not the books constituted a complete record of the business. Furthermore, Judge MORTON apparently overlooked the fact that the witness finally admitted (R. 45, 46):

> *"I can't tell how much they had in the factory because I don't know what goods were in the factory;* * * * *as far as I interpret the books I don't know what there was in the factory on the date of the fire; I don't know how much was out on the island;* I don't know what it was worth; I don't know whether the val-

uations given in the books are correct, whether they are accurate or inaccurate."

That is a specific admission, in clear words, that the books did not give the information contracted for in the clause of the policy in question, and instead of affording ground for refusing to direct a verdict it shows that such direction should have been given.

The petition for certiorari should be denied.

Respectfully submitted,

HENRI BROWN,
San Juan, P. R.

CARROLL G. WALTER,
120 Broadway,
New York, N. Y.,
Counsel for Respondent.

May, 1936.

CPY2123